STATE OF MICHIGAN
IN THE SUPREME COURT

SHAKEETA SIMPSON, as Personal Representative of the ESTATE OF ANTAUN SIMPSON,

Plaintiff-Appellee,

and

SHAKEETA SIMPSON,

Plaintiff,

-vs-

ALEX PICKENS, JR., & ASSOCIATES M.D., P.C., a Michigan Corporation, d/b/a PICKENS MEDICAL CENTER, BRIGHTMOOR GENERAL MEDICAL CENTER INCORPORATED, a Michigan Corporation, d/b/a BRIGHTMOOR-PICKENS MEDICAL CENTER, ALEX PICKENS JR., M.D., and LINDA S. HARTMAN, P.A.,

Defendants-Appellants.

Supreme Court Case No. 152036

Court of Appeals Case No. 320443

Wayne County Circuit Court Case No. 13-000307-NH

MICHIGAN DEFENSE TRIAL COUNSEL'S *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is submitted by the Michigan Defense Trial Counsel ("MDTC") in response to an invitation issued by the Michigan Supreme Court in its Order dated April 6, 2016. The MDTC is a statewide organization of attorneys whose primary focus is the representation of defendants in civil proceedings. Established in 1979 to enhance and promote the civil defense bar, MDTC accomplishes this by facilitating discourse among, and advancing the knowledge and skill of, defense lawyers to improve the adversary system of justice in Michigan. MDTC appear before this court as a representative of defense lawyers and their clients throughout Michigan, a significant number of whom are potentially affected by the issues involved in this case.

The opinion of the Court of Appeals in this matter involves an issue of significant importance to *amicus curiae.*

II. ORDER APPEALED

MDTC adopts and relies upon the statements contained in the brief on appeal of Defendants-Appellants.

III. JURISDICTIONAL STATEMENT

MDTC adopts and relies upon the Jurisdictional Statement contained in the brief on appeal of Defendants-Appellants.

IV. STATEMENT OF QUESTIONS PRESENTED

DOES THE 2005 AMENDMENT TO THE WRONGFUL DEATH ACT, MCL 600.2922, WHICH INCORPORATED PROVISIONS OF MCL 600.2922a, EXPAND THE ELEMENTS OF THE UNDERLYING CAUSE OF ACTION CREATED IN MCL 600.2922a?

The Court of Appeals answered "Yes".
Plaintiff argued that the answer is: "Yes".
Defendants-Appellants argued that the answer is "No".
Amicus curiae Michigan Defense Trial Counsel answers: "No".

MUST THE COURT INCORPORATE ALL OF THE LANGUAGE OF MCL 600.2922a INTO MCL 600.2922 PER THE CLEAR TERMS OF MCL 600.2922?

The Court of Appeals answered "No".
Plaintiff argued that the answer is: "No".
Defendants-Appellants argued that the answer is "Yes".
Amicus curiae Michigan Defense Trial Counsel answers: "Yes"

V. STATEMENT OF FACTS

MDTC adopts and relies upon the statements contained in the brief on appeal of Defendants-Appellants.

VI. LEGAL ARGUMENT

A. Standard of Review

This Court reviews *de novo* a trial court's grant or denial of summary disposition in order to determine whether the moving party was entitled to judgment as a matter of law. *Arabo v Michigan Gaming Control Bd,* 310 Mich App 370, 382; 872 NW2d 223 (2015); *Renny v Dep't of Transportation,* 478 Mich 490, 495, 734 NW2d 518 (2007); *In re MCI Telecommunications,* 460 Mich 396, 413, 596 NW2d 164 (1999).

The Court's goal in interpreting a statute is to give effect to the Legislature's intent as reflected in the statutory language. *Cameron v Auto Club Ins. Ass'n,* 476 Mich 55, 60; 718 NW2d 784 (2006). "While defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase and its placement and purpose in the statutory scheme. A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained. The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme." *Bush v Shebang*, 484 Mich 156, 167; 772 NW2d 272 (2009) (footnotes omitted).

B. Introduction

This case presents three issues that are significant to the jurisprudence of this State. The Court of Appeals opinion unnecessarily added confusion and inconsistency to the rights of a fetus to recover for damages, and to the issue of statutory interpretation.

The first jurisprudentially significant issue is whether it is proper to interpret the words of a statute out of its statutory context, as the Court of Appeals did here.

The second jurisprudentially significant issue is whether the 2005 amendment converted the Wrongful Death Act from a procedural statute (through which substantive claims are filtered) to a statute that establishes substantive claims. If the Court of Appeals ruling is allowed to stand, decades of law regarding the purpose and application of the Wrongful Death Act will effectively be overturned and the issue of whether the prior reported cases are still good law will create confusion and litigation.

The third jurisprudentially significant issue relates to the effect of the Court of Appeals ruling on the underlying statute, MCL 600.2922a, which created a cause of action for wrongful affirmative acts causing injury or death of a fetus. Since the Court of Appeals opinion held that the Wrongful Death Act, and not 600.2922a, created the cause of action, confusion will reign as to whether there remains a viable cause of action for injury to a fetus, or whether that statute was abrogated by amendments to the Wrongful Death Act.

The dispute in this case arises out of differing interpretations of recent changes to the Wrongful Death Act (MCL 600.2922) and MCL 600.2922a. MCL 600.2922a established a cause of action for injury or death of a fetus. The Wrongful Death Act, MCL 600.2922, by its plain language and decades of judicial interpretation, has heretofore acted as a "filter" for causes of action created by other statutes or the common law. In *Johnson v Pastorzia*, 491 Mich 417,

436-37; 818 NW2d 279 (2012), this Court held that the plain language of MCL 600.2922a establishes a cause of action only for active negligence. Plaintiff in the present case contends that the 2005 amendment, which added "or death as described in Section 2922a" to MCL 600.2922, *created* a wrongful death cause of action on behalf of the deceased fetus, and allows a claim for a negligent *failure to act*. The effect is to allow plaintiffs to plead around the language of MCL 600.2922a and this Court's decision in *Johnson v Pastorzia*, and render MCL 600.2922a a nullity.

Amicus curiae, the MDTC, submits that the Court of Appeals erred in its interpretation of both MCL 600.2922 and MCL 600.2922a. The Court of Appeals improperly ruled that the Wrongful Death Act, rather than the underlying statute, MCL 600.2922a, creates a cause of action for a death of a fetus. The Court of Appeals erred by failing to consider all of the language of both statutes. Specifically, the Court of Appeals failed to consider the "if" language of the Wrongful Death Act, which provides that suit can only be brought for wrongful death "if, had death not ensued" that "the party injured [could] maintain an action and recover damages." *Id.* The Court of Appeals also failed to read the language of both statutes in its statutory context.

C. The Wrongful Death Act Does Not Change an Underlying Cause of Action.

In order to understand the import of recent changes to the Wrongful Death Act and how it interacts with underlying causes of action, it is necessary to review, briefly, the history of the Wrongful Death Act. At common-law there was no right to recover damages for wrongful death. *Jenkins v Patel*, 471 Mich 158; 684 NW2d 346 (2004); *Courtney v Apple*, 345 Mich 223, 228; 76 NW2d 80 (1956). Now, however, the Wrongful Death Act provides one unified mechanism for bringing death and survival actions. See *Hawkins v Regl Med Labs., PC*, 415 Mich 420, 436-37; 329 NW2d 729 (1982). In modern times, Michigan's Wrongful Death Act has provided the

exclusive remedy under which a plaintiff may seek damages for wrongful death. *See, e.g., Courtney,* 345 Mich at 228; *Hawkins,* 415 Mich at 437.

The Wrongful Death Act provides that a personal representative of a deceased may bring one, and only one, action to recover for all damages arising out of the death, whether the action would previously have been designated as a survival or a death action. Further, the Act provides a mechanism for determining which beneficiaries of the deceased's estate are entitled to recover. MCL 600.2922(2)-(4); *In re Haque,* 237 Mich App 295, 306; 602 NW2d 622 (1999).

The Wrongful Death Act, itself, does not establish a cause of action. Rather, to bring suit, there must be an independent underlying cause of action which is administered *through* the Wrongful Death Act. *Maiuri v Sinacola Constr Co,* 382 Mich 391; 170 NW2d 27 (1969). This rule has been universally applied for all types of underlying torts. See *Wesche v Mecosta Co Rd Com'n,* 480 Mich 75, 87; 746 NW2d 847 (2008) (the Wrongful Death Act does not waive a governmental agency's statutory immunity); *Hawkins,* 415 Mich at 436; *Waltz v Wyse,* 469 Mich 642, 648; 677 NW2d 813 (2004)("In general, the statute of limitations for a wrongful death action is the statute of limitations for the underlying theory of liability"); *Hawkins,* 415 Mich at 437 (actions brought under the wrongful death act accrue as provided by the statutory provisions governing the underlying tort); *Thorn v Mercy Mem Hos. Corp,* 281 Mich App 644, 656; 761 NW2d 414 (2008) (in order to pursue a medical malpractice wrongful death case, an estate must meet the underlying requirements for a malpractice claim, and the damages recoverable are limited by the malpractice caps); *Cullender v BASF Wyandotte Corp,* 146 Mich App 423, 427; 381 NW2d 737 (1985).[1]

[1] In this case, the parties did not contest that an action for death of a fetus may be brought on behalf of the estate of the fetus, rather than as part of a cause of action that may be brought by the mother. Therefore, this issue has not been preserved in this appeal.

This Court has used the term "filtered" when applying the interaction of an underlying tort claim and the Wrongful Death Act. *See, e.g. Jenkins v Patel*, 471 Mich 158, 165; 684 NW2d 346, 350 (2004); *Wesche v Mecosta Co Rd Com'n*, 480 Mich 75, 88; 746 NW2d 847, 856-57 (2008). By "filtered" this Court has made clear that it meant that the Wrongful Death Act does not change the underlying tort. In *Jenkins, supra*, Court said: "The mere fact that our legislative scheme requires that suits for tortious conduct resulting in death be filtered through the so-called 'death act', MCL 600.2922; …**does not change the character of such actions except to expand the elements of damage available**…." *Jenkins*, 471 Mich at 165-66 (citations omitted) (emphasis added).

D. The Court of Appeals Failed to Follow Established Rules of Statutory Interpretation.

The two statutes at issue are the Wrongful Death Act, MCL 600.2922, which provides that an action for personal injury survives the death of the injured person, and MCL 2922a, the underlying statute which created a cause of action for injury or death of a non-viable fetus. The portion of the Wrongful Death Act at issue here states:

> Whenever the death of a person, injuries resulting in death, or death as described in section 2922a shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death as described in section 2922a, and although the death was caused under circumstances that constitute a felony. [MCL 600.2922(1).]

The statute that created a cause of action for the injury or death of a non-viable fetus, MCL 600.2922a(1), states:

> A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual or physical injury to or the death of the embryo or fetus.

There is no dispute that the underlying cause of action at issue here was created by MCL 600.2922a. Before this statute was enacted, there was no viable cause of action for injury or death of a non-viable fetus. Now, the Wrongful Death Act references MCL 600.2922a, which created a cause of action for injury or death to a fetus caused by a "wrongful or negligent act against a pregnant individual". Under long-established precedent, therefore, the tort created in MCL 600.2922a should be "filtered" through the Wrongful Death Act to allow recovery for the estate of the deceased. However, the Court of Appeals held that the Wrongful Death Act *itself* created the cause of action, and therefore applied the general language of the Wrongful Death Act, instead of applying the specific language of the underlying statute that actually created the cause of action.

In interpreting MCL 600.2922 and 2922a, the Court of Appeals, in its opinion below, *cited* the correct standards for the manner in which it should interpret a statute, but did not *apply* those rules. The Court of Appeals liberally quoted from this Court's ruling in *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205; 815 NW2d 412 (2012) acknowledging that: **"**The rules of statutory interpretation are well-established. The primary goal is to discern the intent of the Legislature." The Court of Appeals also stated: "The best indicator of [Legislative] intent is the language of the statute, and, in determining intent, the words of the statute are given their common and ordinary meaning". *Id.*

The Court of Appeals also acknowledged that, in interpreting a statute,"[s]tatutory language must be read and understood *in its grammatical context*, and effect should be given to every phrase, clause, and word in the statute," citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (emphasis added). It also quoted *Baker v Gen. Motors Corp.*, 409 Mich 639, 665, 297 NW2d 387 (1980) noting: "*No word should be treated as surplusage or*

rendered nugatory." (Emphasis added).

The Court of Appeals erred, however, when it failed to apply these established standards for interpreting statutes to its interpretation of MCL 600.2922a and MCL 600.2922. The Court of Appeals erred in three ways. First, it chose to incorporate only *portions* of MCL 600.2922a into MCL 600.2922, thus failing to incorporate MCL 600.2922a's elements of the tort, i.e. that there was an *affirmative* wrongful act. This partial inclusion effectively failed to interpret the statute in its grammatical context, failed to give effect to every phrase, clause and word, and treated as surplusage much of the statutory wording. Second, instead of using the Wrongful Death Act as a "filter", as is mandated by this Court, it applied the Wrongful Death Act to expand on the legislatively-created cause of action for death of a fetus. Finally, it failed to apply the requirement of the Wrongful Death Act that suit may only be brought under that Act if liability would have existed if death had not occurred.

E. MCL 600.2922a Establishes the Underlying Cause of Action at Issue.

The Court of Appeals held that a failure to act could be the basis for a tort action for a non-viable fetus, regardless of the limitation of MCL 600.2922a commenting: "[n]either the defendants nor the trial court provided any sound legal basis for treating a wrongful-death action brought on behalf of an embryo or fetus any differently that a wrongful death action brought on behalf of 'a person'". *Simpson v Alex Pickens, Jr, & Assoc, MD, PC*, 311 Mich App 127, 135-36; 874 NW2d 359 (2015). This was a misinterpretation of the arguments presented below. The defendants and the trial court did, in fact, show that the underlying statute, MCL 600.2922a, created the cause of action, and that the Wrongful Death Act, MCL 600.2922, was merely a filter for the underlying act.

The Court of Appeals ignored the language of MCL 600.2922a which created the underlying tort. As discussed in subsections C and D, above, whenever there is a wrongful death case, the underlying tort, not the Wrongful Death Act, determines whether—and to what extent—the law recognizes a cause of action. Thus, in malpractice cases, a deceased may not be pursue a suit unless the estate can establish a breach of the standard of care, that a proper Notice of Intent to Sue was filed, that an affidavit of merit was filed by a suitable expert. *See Thorn v Mercy Mem Hosp. Corp,* 281 Mich App 644, 656; 761 NW2d 414 (2008). Similarly, while the Wrongful Death Statute does not provide that a Person cannot sue if the underlying tort is subject to governmental immunity, it is undoubtedly the law. *Wesche v Mecosta Co Rd Com'n,* 480 Mich 75, 87; 746 NW2d 847, 855 (2008). And, the Wrongful Death Act does not say that a Person's damages are capped, as provided by underlying malpractice and product liability statutes. MCL§ 600.1483, 600.2922, 600.2946a. Each of those limitations appears in the underlying statute—not in the Wrongful Death Act—but they are universally applied to limit a cause of action for Wrongful Death.

Critically, the Court of Appeals ignored a key portion of the Wrongful Death Act—the phrase "if death had not ensued," which modifies "would have entitled the party injured to maintain an action and recover damages". MCL 600.2922(1). This language unambiguously provides that suit can be brought only if an injury action could have been brought had the injured party survived. Or, more specifically, in this case, suit cannot be brought for Wrongful Death of a non-viable fetus unless the requirements of MCL 600.2922a are met. Those requirements are that there was a "wrongful or negligent act against a pregnant individual". MCL 600.2922a makes no mention of a negligent failure to act.

Not only did the Court of Appeals ignore that "if" language of the Wrongful Death Act, it also ignored operative language of MCL 600.2922a. That section provides: "A person who commits a *wrongful or negligent act* against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual or physical injury to or the death of the embryo or fetus." MCL 600.2922a(1) (emphasis added). The Court of Appeals applied only the phrase "death of the embryo or fetus," and ignored "a wrongful or negligent act". In effect, the Court of Appeals chose to treat as surplusage and render nugatory much of the language of both MCL 600.2922 and MCL 600.2922a(1), failed to read and understand the language in its grammatical context, and failed to give effect to every phrase, clause, and word in the statute. Inexplicably, the Court of Appeals found that by *eliminating* portions of MCL 600.2922a from its reading of MCL 600.2922, it somehow met the requirement that statutory language is to be read and understood *in its grammatical context*. This interpretation ignored the basic tenet that the court is to presume that every word is used for a purpose and that, as far as possible, the court must give effect to every clause and sentence of a statute. "The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000); see also *Pohutski v City of Allen Park*, 465 Mich 675, 683-84; 641 NW2d 219, 226 (2002).

Essentially, the Court of Appeals held that only the phrase "death of the embryo or fetus" should be inserted into the Wrongful Death Act, MCL 600.2922, from the underlying substantive statute, MCL 600.2922a, and not "wrongful or negligent act". In so doing, the Court of Appeals in effect re-wrote both statutes. This it may not do. When statutory language is clear and unambiguous, courts must enforce the statute as written and no judicial construction is permitted.

Whitman v City of Burton, 493 Mich 303, 311; 831 NW2d 223 (2013). Courts may only go beyond the text to ascertain legislative intent if statutory language is ambiguous. *Id.* at 312.

The Court of Appeals further erred by failing to read the wrongful Death Act, MCL 600.2922, in its statutory context. The Court of Appeals gave controlling weight to the catchall phrase in the Wrongful Death Act that describes the types of actions that can be brought under that Act—that is, tort actions for both affirmative acts and failure to act. The Wrongful Death Act does not create the underlying causes of action, but merely provides that those causes of action are not extinguished by death. It is therefore improper to read the catch-all provision of the Wrongful Death Act as expanding an underlying tort statute. "A catch-all provision is usually inserted into a statute to ensure that the language that immediately precedes it does not inadvertently omit something that was meant to be included." *Sebring v City of Berkley*, 247 Mich App 666, 674; 637 NW2d 552 (2001). "When construing a catch-all phrase, courts will interpret it to include only those things of the same type as the preceding specific list. This is known as the doctrine of *ejusdem generis*." *Id.*

While acknowledging that the Wrongful Death Act and MCL 600.2922a must be interpreted in order to reach a decision, the Court of Appeals also assumes, but does not discuss, that the underlying action is not MCL 600.2922a, but rather is a medical malpractice claim. The Court of Appeals does not explain why the involvement of a malpractice action should change the statutory analysis. Rather, it simply concludes that the action sounded in malpractice, and therefore 600.2922a "need not be considered a statutory cause of action brought under MCL 600.2922a"." 311 Mich App at 137. Of course, there is no common law action for death of a non-viable fetus, and without the provisions of MCL 600.2922a, no such action for the death of a non-viable fetus can be pursued. *Thomas v Stubbs*, 455 Mich 853, 564 NW2d 463 (1997);

McKinstry v Valley Obstetrics-Gynecology Clinic, PC, 428 Mich 167, 192, 405 NW2d 88 (1987). While tort reform has imposed strict procedural and substantive guidelines on the pursuit of malpractice cases, the underlying cause of action remains a common law one. *Cox ex rel Cox v Bd of Hosp Managers for City of Flint,* 467 Mich 1, 10-11; 651 NW2d 356 (2002). Faced with the inherent problem that a malpractice case could not be brought without reliance upon MCL 600.2922a, the Court of Appeals chose to pick certain portions of MCL 600.2922a on which to rely, and to ignore other provisions. It also chose to ignore portions of the Wrongful Death Act. This selective reading of the statutes does not comport with the standards long established for statutory interpretation.

VII. RELIEF REQUESTED

The Supreme Court should reverse the decision of of the Court of Appeals.

Respectfully submitted,

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